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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

## No. 669

HATTIESBURG BUILDING AND TRADES COUNCIL, et al.,

Petitioners,

versus

J. D. BROOME, doing business as Broome Construction and Maintenance Company, et al.,

Respondents.

## SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT

On February 17, 1964, the Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General has filed such a brief. This supplemental brief is in reply thereto.

### The Reasons Advanced by the Solicitor General as to Why the State Court Did Not Have Jurisdiction Should Be Disregarded

The Solicitor General argues that if a secondary boycott charge under Section 8(b) (4) (B) of the National Labor Relations Act had been filed the National Labor Relations Board would have probably asserted jurisdiction because

Pontiac Eastern Corporation was engaged in the production of goods for interstate commerce in sufficient quantities to meet the Board's jurisdictional standards. In his arguments concerning Pontiac Eastern's interstate activities the Solicitor General travelled outside of the record before the Court. The Solicitor General states that Gulf Oil Corporation is "well known to be widely engaged in interstate commerce. . . " . The Solicitor General ignored the fact that it was not shown on the record before the Court that any of the oil produced by Pontiac Eastern Corporation and sold to Gulf moved in interstate commerce. The Solicitor General refers to the stipulation in a Labor Board case involving Pontiac Eastern Corporation. The Solicitor General does not refer to any public record where this stipulation may be found. Moreover, even if the stipulation were a matter of public record, it could not be binding upon the parties to this dispute and is not a matter of record in this case. The Solicitor General recognized that petitioner did not urge the existence of Labor Board jurisdiction based upon Pontiac Eastern's interstate activities. Petitioner undoubtedly recognized that the record before the Court did not show such interstate activities.

We submit that the purported facts as to Pontiac Eastern's interstate activities, not of record before the Court, should not be considered by the Court.

**A State May Properly Enjoin Picketing Conducted to Obtain An Agreement Made Unlawful by State Law.**

Even assuming, arguendo, that jurisdiction of this controversy was not relinquished to the State by Section 14 (b) 2 of the Act, we respectfully submit that State Court action was authorized by Section 14(b) Appendix A, to our original brief. This section provides that nothing in the

Act shall be construed as authorizing the execution or application of agreement requiring membership in a labor organization as a condition of employment in any State in which such execution or application is prohibited by State law. Very recently this Court held that a State Court under Section 14(b) may invalidate and enjoin the enforcement of an agency shop contract found to be in violation of the Florida Right to Work Law. *Retail Clerks International Association v. Schermerhorn*, 11 L. ed. 2d 179 (1963). There, as here, the argument was made that although Florida's Right to Work Law was enforceable under Section 14(b) the State Courts of Florida were without jurisdiction to enforce it and the National Labor Relations Board afforded the only forum for relief. This argument was rejected by the Court.

> In light of the wording of Section 14(b) and its legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the States free to legislate in that field, *we can only assume that it intended to leave unaffected the power to enforce those laws.* . . .
>
> * * * *
>
> . . . But Section 14(b) gives the States power to outlaw even a union-security agreement that passes muster by federal standards. Where Congress gives state policy that degree of overriding authority, *we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington.* (11 L. ed. at 183-184, emphasis added).

This holding should put at rest the question now under discussion. However, the opinion in the *Retail Clerks* case also contains the following dictum, relied upon by the Solicitor General:

> On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union security statute lies exclusively in the federal domain (Local Union 429 v. Farnsworth & Chambers Co. . . . and Local Union #438 v. Curry . . . ) because state power, recognized by Section 14(b) begins *only with actual negotiation and execution of the type of agreement described by Section 14(b)* . . . (11 L. ed. 2d at 185).

We respectfully submit that there is a basic inconsistency in the *Retail Clerks* case between the Court's *holding* on the one hand that Congress "intended to leave unaffected the power to enforce' state laws restricting union security agreements and the Court's *dictum* on the other hand that a State may not enjoin picketing which seeks to force an agreement in violation of such laws. The legislative history of Section 14(b) indicates that Congress did not intend to limit the States in the full enforcement of these laws, including injunction to prevent their violation.

The House Report states:

> It was never the intention of the National Labor Relations Act . . . to preempt the field in this regard so as to deprive the States of their *powers to prevent* compulsory unionism. (House Report No. 510, 80th Congress, First Session, page 60, emphasis added).

The equitable power to prevent threatened and impending law violation is often far more necessary to protect the rights of citizens than is the power to punish or award damages for past violation. Indeed in the case at bar the Court found that immediate and irreparable injury would result from the unlawful activity of the petitioner unless a temporary injunction were immediately granted. A construction of the Act which would tend to encourage law violation and to bar State Courts from preventing violations of State laws will cause incalculable harm and should be avoided.

The case of *Local #438 vs. Curry*, 371 U.S. 542, and *Local Union #429 v. Farnsworth & Chambers*, 353 U. S. 969, appear to be in conflict with the rationale of this Court's later opinion in *Retail Clerks International Association v. Schermerhorn*. Moreover, they appear to be at war with the philosophy and holding of a long series of decisions that a State Court may constitutionally enjoin peaceful picketing which is conducted for an unlawful purpose in violation of State laws and State public policies. *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U. S. 284, 1957. If this analysis of *Curry* and *Farnsworth & Chambers* decisions is correct then we respectfully submit that these decisions were erroneously decided and should now be overruled.

## CONCLUSION

For the foregoing reasons, and for those set forth in our original brief we respectfully submit that the petition herein should be denied.

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April 13, 1964

## CERTIFICATE

I hereby certify that I have this day served by certified mail, postage prepaid, one copy of the above and foregoing Supplemental Brief in Opposition to the Petition for Certiorari on each of the counsel for petitioner; Honorable Ralph N. Jackson, Jackson & Hess, 1310 Oil & Gas Building, New Orleans, Louisiana, and the Honorable Knox W. Walker, Attorney at Law, Gulfport, Mississippi, and upon The Solicitor General of the United States.

This 13th day of April, A. D., 1964.

/s/ Richard C. Keenan

Richard C. Keenan